1988 C.W. 3383

IN THE COUNTY COURT OF DISTRICT NUMBER FOUR

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

- and -

BRUCE ROBERT MACPHEE

RESPONDENT

HEARD: At Windsor, N.S., on the 15th day of February, 1989.

BEFORE: The Honourable Judge Donald M. Hall, J.C.C.

DECISION: January 24, 1990.

COUNSEL: William Fergusson, Q.C.
Counsel for the Crown

Michael Cooke, Esq.,
Counsel for the respondent.

HALL, D.M., J.C.C.

This is an appeal by the Crown of an acquittal on a charge under section 237(a) of the Criminal Code, the breathalyzer section. The acquittal was entered at Shubenacadie by His Honour Judge J.L. Batiot of the Provincial Court on May 5, 1988, following a trial held January 14, 1988.

The Crown has appealed that decision contending that the learned trial judge was in error in refusing to admit the certificate of analysis in evidence on the ground that the demanding police officer "did not have sufficient basis in fact to make the said demand."

For the purposes of this appeal the facts are very simple. At about 10 p.m. on July 4, 1987, Constable Kenneth Freeman Brown of the Royal Canadian Mounted Police observed an automobile in the ditch on the Ess Road, Hants County. When the officer stopped to investigate he observed two men on the doorstep at a darkened nearby residence. As the officer was going toward the residence to investigate the two men ran away. A few minutes later one of the men, the respondent, appeared near the ditched motor vehicle. In the opinion of Constable Brown the appellant was intoxicated. Constable Brown, however, placed the respondent under arrest for trespassing at night. He informed the respondent of his Charter rights as well as the so-called "police caution", searched him and placed him in the back seat of the police car. The

officer then went up to the ditched vehicle where he spoke briefly to the respondent's wife. Upon his return to the police car he placed the respondent under arrest for impaired driving. He then read to the respondent the so-called breathalyzer demand. The respondent agreed to provide samples of his breath which he subsequently did, resulting in readings of 165 and 150 milligrams of alcohol in 100 millilitres of blood.

It is clear from the transcript of the evidence of Constable Brown that he did not testify respecting his belief prior to making the demand as to whether the respondent had been driving a motor vehicle during the preceeding two hour period. In this respect the learned Trial Judge said:

> Constable Brown presented no evidence at that time that Mr. MacPhee had been the driver and had thus committed an offence within the preceeding two hours contrary to s. 237 of the Criminal Code. Indeed it was clear at trial that the Crown relied heavily on Mr. Well's evidence to establish that Mr. MacPhee had been the driver and that evidence was only available to Constable Brown some 7 days after the demand was made.
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> He concluded:
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> It is my opinion that Constable Brown did not have sufficient basis in facts to make the said demand and I find Mr. MacPhee therefore not guilty as charged as the certificate of analysis is not admissible against Mr. MacPhee.

Counsel for the appellant relied on Rilling v. R., (1975) 24 C.C.C.(2d)81, in support of his position that the evidence of the breath results ought not to have been excluded from the evidence. He also referred to

a decision of this Court in R. v. Hiltz, (1988) 80 N.S.R.(2d) 85.

Counsel for the respondent contended that Rilling, having been decided before the advent of the Charter, was no longer applicable. In support of this position he referred the Court to Lloyd v. R., (1988) 86 N.S.R.(2d) 127 and Mood v. R., (1988) 85 N.S.R.(2d) 178. In Lloyd, which was an appeal of a conviction under s. 237(b) of the Code where the evidence of the blood alcohol level was contained in a certificate of analysis, the Honourable Judge Haliburton quoted from the decision of the Appeal Division of the Nova Scotia Supreme Court in Mood as follows:

> Rilling is a pre-Charter decision. This Court has stated in two recent post-Charter decisions that a spot check and a random stop of a motor vehicle by a police officer exercising a common law right does not constitute an unreasonable search or an arbitrary detention contrary to the Charter of Rights and Freedoms. We refer to R. v. Doucette, (1987) 76 N.S.R.(2d) 79 and R. v. Whynacht, S.C.C. 01581, July 9, 1987, as yet unreported.
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> The appellant's detention at the R.C.M.P. Detachment was a detention pursuant to a breathalyzer demand. The argument of the appellant is that such detention was arbitrary in that the police officer lacked the requisite belief under then s. 235(1) of the Code.
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> It is further argued that, without such belief, the detention of the appellant was arbitrary and that the results of the breathalyzer tests were obtained in violation of the appellant's rights under s. 9 of the Charter and should be excluded under s. 24(2).
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> To make such an argument there has to be a finding of fact that the police officer did not have the reasonable and probable grounds to formulate such a belief.

Judge Haliburton went on to say:

> It is primarily on the strength of the last paragraph quoted that Defence Counsel argues that Rilling is no longer the law in Nova Scotia, at least in circumstances where there is a finding of fact by the Trial Judge that the police officer did not have reasonable and probable grounds to make a demand. After reviewing Rilling and considering the decision as rendered by Clark, C.J.N.S. in Mood, I find I am persuaded by that argument. While the comments in Mood are effectively obiter, there is a clear indication that in the absence of reasonable and probable grounds to formulate a belief that an offence has been committed, there would be "an argument" that the Charter s. 9 rights of the Accused had been infringed and that evidence obtained pursuant to that breach should be excluded under s. 24(2).

Judge Haliburton found that there had been a violation of Lloyd's Charter rights in that he had been arbitrarily detained. He allowed the appeal, set aside the conviction and entered an acquittal.

This decision of Judge Haliburton was appealed by the Crown but the appeal was subsequently abandoned.

In Rilling, Judson J. speaking for the majority of the Court said at page 83:

> It is my opinion that this Court should accept and adopt the views expressed in the Orchard, Showell and Flegel cases, supra, and hold that while absence of reasonable and probable grounds for belief of impairment may afford a defence to a charge of refusal to submit to a breathalyzer test laid under s. 235(2) of the Criminal Code, it does not render inadmissible certificate evidence in the case of a charge under s. 236 of the Criminal Code. The motive which actuates a peace officer in making a demand under s. 235(1) is not a relevant consideration when the demand has been acceded to.

In Hiltz, which was also an appeal of a conviction under s. 237(b) based on an unlawful detention,

after stating that there was insufficient evidence to establish such I said at page 89:

> Section 24(2) of the Charter may only be invoked to exclude evidence where a violation of a person's rights under the Charter have been proved. Since no such infringement has been proved section 24 is not applicable.

In the present case the respondent, before the demand was made had been placed under arrest, first for trespassing at night and then for impaired driving. There was evidence to indicate that the arrest was reasonable in the circumstances and that the respondent's detention was not unreasonable or arbitrary. The learned Trial Judge, however, made no finding in this respect. In my respectful opinion, in light of the ruling in Rilling, evidence obtained as a result of a demand under section 238 of the Code may not be excluded from evidence on the ground that the demanding officer did not have reasonable and probable grounds to give the demand, at least, unless it resulted in a violation of the subject's Charter rights. Should this occur it may be possible that the evidence may be excluded under section 24(2) of the Charter, but the jurisprudence in this respect is still anything but clear.

Since there does not appear to have been a violation of the respondent's Charter rights in obtaining the breath samples and there was no finding by the Trial Judge in this respect, section 24 of the Charter does not apply. Furthermore, I can find no other basis, and

none was argued, for excluding the evidence. Accordingly, I have concluded that on the face of it the evidence of the breathalyzer analyses ought to have been received in evidence.

It is noted that the transcript of the trial proceedings does not contain any comments or submissions by way of summation by Mr. Cook who was also counsel at trial. As a result I have no idea of what arguments he presented, if any, and if indeed he was called upon or accorded an opportunity to present his submissions.

Accordingly, although I have concluded that the appeal must be allowed for the reasons stated, a new trial will be ordered as much as I am reluctant to do so due to the lengthy period of time that has elapsed since the incident occurred. Much of that delay occurred after this appeal was launched. First there were several adjournments requested by counsel in anticipation of the Appeal Division's ruling in Lloyd, which it was thought would settle the issue argued on this appeal. As stated above, the Lloyd appeal was abandoned and this appeal was heard on February 15th, 1989. For some inexplicable reason it appears that after the hearing of the appeal the file was lost or misplaced. The matter was completely lost sight of and only resurfaced when a police officer inquired as to the result of the appeal. Despite extensive searches for the file it could not be found and replacement material had to be obtained. I regret any inconvenience caused

to the interested parties occasioned by the delay.

There will be no costs on this appeal.

Donald M. Hall
Judge of the County Court
of District Number Four

W. Fergusson, Q.C.
Counsel for the Crown.

Michael Cooke, Esq.,
Counsel for the Respondent